ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION I

CACR06-922

April 11, 2007

APPEAL FROM THE CHICOT COUNTY CIRCUIT COURT
[CR-05-32-4]

FREDERICK F. LEE
APPELLANT

V.

HONORABLE DON E. GLOVER, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant, Frederick Lee, was convicted by a Chicot County jury of domestic battery in the third degree, aggravated assault, and being a felon in possession of a firearm. The trial court ran the sentences concurrently, for a total of twenty-five years' incarceration. Appellant does not contest the sufficiency of the evidence to support his convictions; rather, he contends (1) that the trial court erred in denying his request for a jury instruction on assault in the third degree as a lesser-included offense of aggravated assault because there was contradictory evidence as to whether he had a firearm; and (2) that the trial court abused its discretion by refusing to grant his request for a mistrial after he

created a disturbance in the courtroom and the prosecutor commented in front of the jury that appellant had threatened him. We affirm.

Appellant was romantically involved with a woman named Rumika Williams. On March 16, 2005, some of Rumika's family saw her in a car with appellant, and she had a severely scratched and swollen face. One of the family members, John "Pat" Williams, Jr., called the police and reported an incident of domestic abuse.

At trial, Sheena Williams, Rumika's sister, testified that she tried to pull Rumika out of the car; that appellant was pulling Rumika from the other side, trying to make her stay in the car; and that Rumika, who had her baby in her arms, refused to get out of the car. Sheena said that after this incident, her uncle went to check on Rumika and came back and reported that appellant had pulled a gun on him. Sheena said that later she was a passenger in a car that drove by appellant's mother's house, and appellant was standing in the yard. Sheena said that when they drove past, appellant held up his gun, shook it, and yelled that he would "shoot her ass."

Pat Williams, Rumika and Sheena's uncle, testified that he had received a call about Rumika and had gone to her apartment to check on her. When he arrived, appellant, Rumika, and Rumika's baby were on the sidewalk. Pat said that Rumika's face was badly swollen, and he told her that she "shouldn't put up with that." Appellant told Pat that Rumika was his girl, that Pat was messing with his girl, and that Pat needed to stay out of it. Pat said that appellant got into a car, opened the door, stepped back out of the car, pulled a pistol, pointed it at Pat, cocked it, and told Pat that he had "better go on." Pat

said that he got into his truck and left because appellant had already hurt his niece and he thought that it was in his best interest to go ahead and leave. Pat went home and told his mother about the incident, and she told him to report it to the police. Pat said that on his way to the police station, as he drove by appellant, appellant was standing in a crouched position behind the car with the pistol in his hand.

Rumika testified that her relatives were making these accusations because they did not like appellant. She also testified that she did not see a gun. Appellant's mother also said that appellant did not have a gun. A police search of appellant's mother's house, where appellant lived, did not reveal a gun.

Appellant's counsel proffered a jury instruction for assault in the third degree, asserting that it was a lesser-included offense of aggravated assault, arguing that the jury could believe that appellant did not have a gun. The prosecutor argued that the evidence did not support such an instruction, and the trial court agreed. The trial court stated that there was an absence of testimony to contradict the testimony of Pat Williams, and that at the time of the incident, Rumika Williams was not in the car, therefore she could not have seen a gun and in fact testified that she did not see a gun.

Appellant argues on appeal, as he did below, that third-degree assault is a lesser-included offense of aggravated assault based upon *Wooten v. State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990). *Wooten* does in fact hold that proposition, relying upon *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986). Appellant's reliance upon *Wooten* is misplaced. In *Wooten*, this court held that while there was evidence that Wooten backed

up behind a car, refused to obey an officer's instructions, pulled a gun out of his pocket, and peered over the car, the evidence also indicated that Wooten never pointed the gun at the officer or expressly threatened him. In the present case, there was evidence that appellant not only pointed the gun at Pat Williams, but he also cocked the gun and told Williams that he had "better go on" as appellant pointed the gun at Williams.

It is reversible error to refuse to instruct on a lesser-included offense if there is the slightest evidence to support the instruction. *Boyle v. State*, 363 Ark. 356, ___ S.W.3d ___ (2005). However, where there is no evidence tending to disprove one of the elements of the larger offense, the trial court is not required to give an instruction on a lesser-included offense. *Stultz v. State*, 20 Ark. App. 90, 724 S.W.2d 189 (1987). A trial court's decision not to give an instruction on a lesser-included offense will be affirmed if there is no rational basis for giving the instruction, and a trial court's ruling with regard to the submission of such an instruction will not be reversed absent an abuse of discretion. *Boyle, supra*.

In this case, there was no rational basis for giving the jury instruction for third-degree assault. A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person or displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person. Ark. Code Ann. § 5-13-204 (Repl. 2006).

Appellant argues that the jury could believe that he did not have a gun. However, if that were true, there would be no assault. Telling someone that he had "better go on,"

without more, does not create an apprehension of imminent physical harm. Either appellant had a gun, cocked it and pointed it at Pat Williams, and told him to "go on," or no assault occurred. Therefore, there was simply no rational basis for giving an instruction on third-degree assault.

Appellant also argues that the trial court erred in refusing to grant a mistrial during the sentencing phase of the trial. During the prosecutor's closing arguments, appellant muttered unintelligible statements on two occasions, after which the prosecutor commented in front of the jury, "Your Honor, he just threatened me again," and "He took off his cuff, Your Honor. He's looking at me like he's threatening me." Appellant then created a disturbance in the courtroom and was removed. His counsel moved for a mistrial, arguing that the prosecutor's remarks were inflammatory and that the prosecutor had commented that appellant was wearing handcuffs. Counsel said that he did not know what his client said to the prosecutor and was not arguing that it might not have been a threat, but he contended that the best approach would have been a bench conference outside the hearing of the jury instead of making the comments in open court, which did nothing but prejudice the jury against appellant. The prosecutor responded that appellant prejudiced himself when he made the threats, that the prosecutor did not ask appellant to threaten him, and that his comments were not a valid reason for a mistral. The trial court denied appellant's motion for a mistrial.

Prior to retiring to deliberate appellant's sentences, the jurors were admonished by the trial court that they were not to take into consideration the outburst made in the

courtroom. The trial judge also told the jury that appellant was escorted out of the courtroom based on his instruction and that was not to be considered during deliberations.

After the jury retired, the trial court called Jerry Waldrup, a deputy sheriff, to testify with regard to what had occurred in the courtroom. Waldrup testified that he had noticed that appellant was getting "fidgety," so he had taken appellant out of the courtroom and handcuffed him in the front in case he decided to run. He said that during the prosecutor's closing argument, he noticed appellant trying to get the cuffs off, and when the prosecutor said that appellant had slipped the cuffs, he saw that appellant only had one cuff on, with the other cuff in his right hand like he was going to use it for a weapon. Waldrup said that appellant was looking at the prosecutor "real hard," so Waldrup told appellant to stand up, at which time appellant jumped up. Waldrup said he grabbed appellant, pushed him against the table, and began trying to re-cuff him behind his back. Waldrup said that he tightened the cuffs as tight as he could, and that he did all of this in the presence of the jury. Waldrup stated that although he could not remember exactly what was said, he heard appellant verbalize threats toward the prosecutor, and that if appellant had lunged at the prosecutor, Waldrup would not have been able to catch him because appellant was smaller and quicker than he was. Waldrup said that appellant threatened him as well, saying that he was from Lake Village and that he "kn[e]w where y'all live[d]."

The jury sentenced appellant to one year in the county jail for domestic battery, seven years in the Arkansas Department of Correction for aggravated assault, and twenty-five years in the Arkansas Department of Correction for being a felon in possession of a

firearm. Although the jury recommended that the sentences be served consecutively, the trial court elected to run the sentences concurrently, noting that the State had asked the jury to sentence appellant to twenty years and that the jury had given twenty-five years on one count and seven on another. In making the decision to run the sentences concurrently, the trial court stated that it was seldom that an outburst was seen in the courtroom, but that the trial court wanted to make every effort to ensure that appellant was in no way penalized for his actions in the courtroom.

A mistrial is an extreme remedy and is proper only when an error is so prejudicial that justice cannot be served by continuing the trial and when it cannot be cured by an instruction. *Flowers v. State*, 92 Ark. App. 29, 210 S.W.3d 907 (2005). The decision to grant a mistrial is within the sound discretion of the trial court. *Id.*

There was no abuse of discretion in this case. It was apparent from the prosecutor's statements and the deputy sheriff's testimony that appellant made some sort of comments to the prosecutor and had one handcuff off and was holding it like a weapon. As our supreme court held in *Morgan v. State*, 308 Ark. 627, 630, 826 S.W.2d 271, 273 (1992), "[A] defendant cannot be allowed to abort his own trial and frustrate the process of justice by his own acts. Further, we have repeatedly held under the invited error rule that one who is responsible for error cannot be heard to complain of that for which he was responsible."

The trial court also admonished the jury that it was not to take into consideration appellant's outburst in the courtroom in determining his sentences. Furthermore, even though the jury recommended that the sentences be served consecutively, the trial court

decided to make the sentences concurrent, stating that it wanted to ensure that appellant was in no way penalized by his outburst in the courtroom. Appellant also argues that the jury's sentence recommendation indicated that the prosecutor's comments prejudiced him; however, as the State points out, appellant was sentenced to less than the maximum sentences within the statutory ranges for his crimes, so he cannot prove prejudice from the sentence itself. *See Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002).

Affirmed.

ROBBINS and HEFFLEY, JJ., agree.